

m-4.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, STATE OF UTAH  
IN AND FOR THE COUNTY OF UTAH.

\*\*\*\*\*

PROVO RESERVOIR COMPANY, a  
corporation,

Plaintiff,

vs.

PROVO CITY, et al. including  
A. L. TANNER and ESTHMA TANNER,

Defendants.

AMENDED ANSWER OF

A. L. TANNER AND ESTHMA  
TANNER.

\*\*\*\*\*

Come now the defendants, A. L. Tanner and Esthma Tanner,  
appearing for themselves alone and not for the other defendants,  
and, by leave of court first had and obtained, file this their  
~~XXXXX~~ amended answer to plaintiff's complaint, filed herein,  
and state, deny and allege as follows:

1. These defendants admit all of the allegations of  
said complaint from the first paragraph thereof to the 32nd  
paragraph thereof inclusive.

2. These defendants also admit the 34th, 28th and 39th  
paragraphs of said complaint and the allegations contained therein.

3. Answering the 33rd paragraph of said complaint, these  
defendants deny that they have any knowledge or information suf-  
ficient to form a belief as to the matters therein contained.

4. Answering paragraph 35 of said complaintm these de-  
fendants, answering for themselves alone, deny said paragraph  
and the allegations therein contained, but as to the matters therein  
alleged against and concerning the other defendants in this action,  
these defendants deny that they have any knowledge or information  
sufficient to form a belief.

5. Answering the 36th paragraph of said complaint,  
these defendants admit that many of the defendants, having a right

prior in point of time of appropriations to the plaintiff's right to the use of said waters, have been using water wastefully as alleged in said paragraph, but as to the extent to which said water has been wasted and the extent of the injury caused thereby, or the effect the same may have in general or in particular, these defendants have no knowledge or information sufficient to form a belief.

6. Answering the 37th paragraph of said complaint and the allegations therein contained, these defendants admit the rendition of the decrees rendered in 1889 and 1905 as described in said paragraph. As to the remaining allegations in said paragraph, these defendants deny they have any knowledge or information sufficient to form a belief concerning the same.

7. Further answering said complaint, these defendants deny generally each and every paragraph thereof and the allegations contained therein, except such as are herein admitted or denied.

Further answering said complaint and by way of counterclaim and for affirmative relief, defendants allege:

1. That the Provo river is a natural stream of water rising in the Wasatch mountains, flowing through Provo canyon in a southerly direction and through the lands adjacent to Provo City, Utah.

2. That these defendants, and their predecessors in ~~tax~~ interest have for more than forty years last past been the owners of lands in the vicinity of Provo City, Utah, and about five miles from the mouth of Provo canyon, which in their natural state were desert and barren, but which, when brought under irrigation and cultivation, yielded abundant agricultural crops.

3. That more than forty years ago the grantors and predecessors in interest of these defendants, for the purpose of irrigating said lands constructed a ditch connected with the Provo river about three miles below the mouth of Provo canyon and placed

a dam in said Provo river for the purpose of diverting waters therefrom into said ditch and have since said date, and up to about the year 1912 maintained said dam in said river and diverted the flowing waters of said river and by means thereof irrigated the said lands above referred to, the said ditch through which said water was so diverted being at times called the Carter ditch.

4. That on or about the year 1900 the waters theretofore diverted through the said Carter ditch were taken therefrom and placed in and diverted through the West Union Canal and in about the year 1903 the said waters were again transferred from said West Union Canal to the Provo Bench canal and have been diverted and used through said canal, except when the use of the same has been wrongfully interfered with contrary to the rights of these defendants.

5. That after the lapse of years after the commencement of the diversion of said waters through said ditch as aforesaid, the character of the lands adjacent to the lands through which the lower portion of said ditch run, underwent a change and became impregnated with water to a greater or less extent and by reason of such impregnation springs and seeps came into existence and the waters thereof were and have since been used for the irrigation of the lands of these defendants.

That said seeps and springs have their source in higher lands and flow by reason of the ~~xx~~ irrigation of said higher lands and the water supply of these defendants is wholly dependent upon the continued irrigation of said higher lands.

6. That the defendant, A. L. Tanner, is the owner of forty-eight acres of land above described, of which thirty-five acres have been irrigated and the defendant, Esthma Tanner, is the owner of sixty-three acres of the land above described of which sixty acres have been irrigated, and as against all the parties to this

action are entitled to be irrigated by reason of the prior appropriation and use aforesaid.

That the right to irrigate said lands is a good and valid right as to each of these defendants as against all the parties to this action and the said springs and seeps are sufficient with reasonable economy to properly irrigate the same, as the same are now diverted for said use. These defendants allege that should said springs and seeps fail, that they, upon that contingency, would be entitled to receive, and are the owners of the right to the use of sufficient of the flowing waters of the said Provo river to properly irrigate eighty-five acres thereof by reason of the prior appropriation and use as aforesaid.

Further answering said complaint, defendants affirmatively allege:

1. That a portion of said lands above described, are bench lands, but a greater portion, commonly known as bottom lands, lie at small elevation above the water surface of the Provo river.

2. That by reason of the irrigation of the bench lands belonging to other owners, comprising thousands of acres, the natural ground water level of the bottom lands owned by these defendants has, year by year, gradually risen and now has risen to such an extent as to strongly detract from their productivity and such water level and condition is permanent except that the water level may further rise unless said lands are artificially drained.

3. That in order to restore these lands to their original fruitfulness and productivity, these defendants have dug ditches and laid tile drains therein, and will of necessity be required to extend said drains to practically all of said bottom lands to remove therefrom the surplus water and lower the level of the ground water ~~sufficiently~~ artificially created to such depth below the sur-

face of the soil as will permit agricultural crops, properly raised thereon, to thrive and mature in their natural abundance.

4. That the amount of water now collected in said drains is a substantial quantity and will, by reason of natural laws and actual conditions, continue to increase in quantity within reasonable limits.

5. That the water so collected in said drains from beneath the surface of said lands will be discharged by said drains, when the drainage system is completed, into the Provo river at an elevation of from three to fifteen feet below the level of the lands so drained.

6. That after the waters discharged from said drainage system are commingled with the waters of Provo river, they flow down said stream and are available for the use of the parties owning lands lower down on said stream and at a lower elevation, but the waters so discharged and to be discharged from said drainage system, are not waters that were flowing in said river at the time the users of water therefrom below made their appropriation, but on the contrary are an added volume thereto in which the said users below have, nor have they had, any right, title or interest.

7. That the defendants herein are the owners of a right to carry waters for the irrigation of land through the Provo Bench canal and there are lands lying under said Provo Bench canal that are susceptible of irrigation therefrom and are now barren by reason of non-irrigation.

8. That the said waters discharged through said drainage system into the Provo river as aforesaid, at one time formed a part of the flowing waters of said river higher up and above said lands of defendants and formed a part of the waters appropriated by the users of water diverting the same from said river above these lands and said users spread said waters upon their lands for irrigation and

a portion thereof finds its way into defendants' lands waterlogging the same and which is now and will be discharged through the drainage system, is entirely lost to and abandoned by them.

9. That the said defendants, by reason of the premises, are the owners of the right to divert from the flowing waters of the Provo river at and through the Provo Bench canal at all times of the year a quantity of water equal in volume to the quantity discharged into said Provo river through said drainage system.

10. That application to the State Engineer in due form of law was made for permission and an order to use said water flowing and to flow from said drainage system through the Provo Bench canal, but said Engineer refused to pass upon the same in any manner whatsoever either allowing or disallowing the same upon the ground that the said waters were not public waters and therefore not under his jurisdiction under the law.

WHEREFORE, these defendants pray that they may be adjudged to be the owners of the right to the use of the springs and seeps hereinbefore described and as now diverted by them, for the purpose of irrigating their said lands. The said defendant, A. L. Tanner, for the irrigation of thirty-five acres and the said defendant, Esthma Tanner, sixty acres and that such right be decreed and that it be further decreed that in case said springs and seeps should fail, that the said defendants jointly be decreed to be the owners of sufficient of the flowing waters of Provo river to ~~be~~ properly irrigate eighty-five acres of said lands, the quantity to be determined by a pro rata distributing according to the acreage entitled to irrigation.

That these defendants be adjudged and decreed to be the owners of the right to the use of the quantity of water flowing from said drainage system in the said lands and of the right to divert such quantity as there may be from time to time flowing

therefrom through the Provo Bench canal.

That these defendants' title to said waters be quieted and affirmed against each and all the parties to this action and that they and each of them, their agents, servants and employees be forever enjoined and restrained from interfering with these defendants' use of said waters or from claiming title thereto adverse to these defendants.

These defendants pray for general relief and for costs.

Thurman Wedgwood Irvine  
Attorneys for Defendants,  
A. L. Tanner and Esthma Tanner.

State of Utah,     |  
                      |     ss  
County of Utah    |

A. L. Tanner being first duly sworn, on his oath says, that he is one of the answering defendants in the above entitled cause that he has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated upon information and belief and as to such matters he believes it to be true.

A. L. Tanner

Subscribed and sworn to before me this \_\_\_\_\_ day

April, 1916.

Joseph Dixon  
Notary Public.



Service of the writs acknowledged  
and copy received this 2nd day of  
May 1916.  
Thurman Wedgwood Irvine  
Attorneys for R.R.